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IN THE
COURT OF APPEALS OF INDIANA

MARK WEINBERGER, M.D., MARK WEINBERGER, M.D., P.C., MERRILLVILLE CENTER FOR ADVANCED SURGERY, LLC, AND NOSE AND SINUS CENTER, LLC.,	)	
Appellants,	)	
vs.	)	No. 45A05-0606-CV-337
AMY HELLMAN, n/k/a AMY VERHOEVE, INDIANA DEPARTMENT OF INSURANCE, et al.,	)	
Appellees.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Robert A. Pete, Judge
Cause No. 45D05-0507-MI-36

April 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Dr. Mark Weinberger and organizations created by him appeal the trial court's denial of their motion to dismiss and its discovery sanctions order. Amy Verhoeve and a number of other former patients of Dr. Weinberger ("the plaintiffs") cross-appeal the trial court's denial of their motion for default judgment. The Indiana Department of Insurance ("the Department") and the Patient's Compensation Fund ("the Fund") also are parties

and cross-appeal the trial court's denial of their own motion to dismiss the patients' motion for default judgment. We dismiss all of the purported appeals.

Issue

The dispositive issue we address sua sponte is whether this court has jurisdiction to consider the parties' appeals.

Facts

Dr. Weinberger was an otolaryngologist with a large practice in Merrillville. He specialized in sinus problems and often recommended surgery for such problems. It is alleged that such recommendations often were unnecessary and/or that such surgeries were performed negligently.

On June 10, 2004, Catherine McGuckin was the first patient of Dr. Weinberger's to file a proposed medical malpractice complaint against him and his medical practice organizations with the Department, in accordance with the Medical Malpractice Act ("the Act"). A second patient followed suit in August 2004. In September 2004, Dr. Weinberger went on a trip to Greece with his wife. One morning, she woke up to find him missing. Dr. Weinberger's current whereabouts are unknown, although his wife has expended considerable effort to locate him, and there appears to be some evidence that he might have planned his disappearance and is still alive.[1]

After Dr. Weinberger's disappearance, approximately 280 additional patients filed proposed complaints against him with the Department. Obviously, Dr. Weinberger never

[1] The unusual circumstances surrounding Dr. Weinberger's disappearance have been widely reported by local and national media.

has been personally served with notice of the complaints filed after his disappearance; notice for these complaints was sent to his last known residence. The plaintiffs had difficulty obtaining some discovery during the course of proceedings before the medical review panel because Dr. Weinberger's attorneys claimed he and his organizations had not received appropriate service of process. Not surprisingly, Dr. Weinberger also failed to appear at a deposition scheduled for April 14, 2005.

On July 13, 2005, the plaintiffs initiated an action in the trial court entitled, "Motion for Preliminary Determination of a Question of Law Pursuant to I.C. 34-18-11-1, To Wit: Motion for Default Judgment for Defendants' Failure to Respond to Discovery." App. p. 36. At the time of that filing and still, the medical review panel has not completed its review of the proposed complaints against Dr. Weinberger and his organizations. However, Indiana Code Section 34-18-11-1 permits a party in a medical malpractice proceeding to, among other things, request a trial court to resolve discovery disputes that have arisen before the medical review panel before the panel has completed deliberations. In addition to Dr. Weinberger and his organizations, the plaintiffs named the Department as a defendant in this motion because, as they noted in the motion, pursuant to the Act, the Fund might be required to pay at least a portion of any judgment entered against Dr. Weinberger and his organizations. The plaintiffs sent notice of this motion to Dr. Weinberger's last known address and to the attorneys and receiver for his organizations. Additionally, the plaintiffs sought and obtained service by publication and through the Secretary of State.

On August 15, 2005, Dr. Weinberger and his organizations filed a motion to dismiss the plaintiffs' motion for default judgment for lack of personal jurisdiction. On September 14, 2005, the Department filed its own motion to dismiss the plaintiffs' motion for lack of subject matter jurisdiction. On February 22, 2006, the trial court entered an order denying both motions to dismiss. The Department filed a motion to certify the February 22 ruling for interlocutory appeal, which the trial court denied on April 10, 2006.

On May 22, 2006, the trial court entered an order denying the plaintiffs' request for default judgment. It also concluded that Dr. Weinberger's disappearance did not relieve the plaintiffs of their obligation to complete the proceedings before the medical review panel. However, it also ordered that in the event Dr. Weinberger eventually was located, he could not offer any sworn testimony to defend the cases against him, either before the medical review panel or in any subsequent proceedings before a trial court.

On June 21, 2006, Dr. Weinberger and his organizations filed a notice of appeal, seeking to challenge both the February 22 and May 22 rulings of the trial court. The notice averred that "[t]his appeal is from a final judgment." Also, apparently on June 20, 2006, the plaintiffs filed a motion to certify the May 22 ruling for interlocutory appeal.[2] According to the trial court's docket, which we recently accessed electronically, it never ruled on this motion or set it for hearing. As briefing on this case progressed, the plaintiffs raised as a cross-appeal issue the trial court's denial of their motion for default

[2] The filing of this motion is not reflected on the trial court's docket until July 19, 2006.

judgment. In addition to fighting the plaintiffs' cross-appeal issue, the Department and Fund have raised their own cross-appeal, asserting that its motion to dismiss the plaintiffs' motion for default judgment should have been granted. Briefing on this case has now been completed.

Analysis

We have the duty to determine whether we have jurisdiction over an appeal before proceeding to determine the rights of the parties on the merits. Allstate Ins. Co. v. Scroghan, 801 N.E.2d 191, 193 (Ind. Ct. App. 2004), trans. denied. The authority of this court to exercise appellate jurisdiction generally is limited to appeals from final judgments. Allstate Ins. Co. v. Fields, 842 N.E.2d 804, 806 (Ind. 2006). "An appeal from an interlocutory order is not allowed unless specifically authorized by the Indiana Constitution, statutes, or the rules of court." Scroghan, 801 N.E.2d at 193. The authorization to pursue an interlocutory appeal is to be strictly construed, and any attempt to perfect such an appeal without such authorization warrants a dismissal. Id.

Whether the parties have appealed a final judgment governs the appellate courts' subject matter jurisdiction, and the parties cannot waive lack of jurisdiction. Georgos v. Jackson, 790 N.E.2d 448, 451 (Ind. 2003). "Whether a jurisdictional defect is raised by a party or discovered by the Court and acted upon sua sponte, is of no consequence." Cohen v. Indianapolis Mach. Co., Inc., 167 Ind. App. 596, 598, 339 N.E.2d 612, 613 (1976). "The obvious purpose of the final judgment rule and the strict limitation of interlocutory appeals is to prevent the needless and costly delay in the trial of lawsuits which would result from limitless intermediate appeals." James v. Board of Comm'rs of

Hendricks County, 182 Ind. App. 697, 701, 396 N.E.2d 429, 432 (1979). "Indeed, many potential errors may be mooted by the final result of judgment because the result is acceptable to the party who might otherwise complain." INB Nat'l Bank v. 1st Source Bank, 567 N.E.2d 1200, 1202 (Ind. Ct. App. 1991).

Dr. Weinberger and his organizations claimed in their June 21, 2006 notice of appeal that this is an appeal from a final judgment.[3] That is not the case. A final judgment is one that disposes of all issues as to all parties, thereby ending the particular case and leaving nothing for future determination. Georgos, 790 N.E.2d at 451 (citing Ind. Appellate Rule 2(H)(1)). The May 22, 2006 order merely (1) denied the plaintiffs' motion for default judgment and (2) imposed a discovery sanction in the form of preventing Dr. Weinberger from testifying in future proceedings should he turn up. Otherwise, there is nothing "final" about the order. The case will continue before the medical review panel and then, possibly, litigation might continue before the trial court. The order in no way disposes of all issues between the parties. Nor does it fit within any of the other categories of "final judgment" listed in Indiana Appellate Rule 2(H):

> (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;

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[3] Clearly, the June 21, 2006 notice of appeal could not have applied to February 22, 2006 order. There is a thirty-day time limit that applies to filing a notice of appeal from a final judgment or an interlocutory order that is appealable as of right, or a thirty-day time limit for seeking trial court certification of an order for discretionary interlocutory appeal. See Ind. Appellate Rules 9(A)(1), 14(A), 14(B)(1)(a). Thus, we need consider only the propriety of appealing the May 22, 2006 order.

> (3) it is deemed final under Trial Rule 60(C);
>
> (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
>
> (5) it is otherwise deemed final by law.

The May 22, 2006 order was not a "final judgment" for purposes of appellate jurisdiction. It was an interlocutory order. Indeed, this court previously has held that a preliminary determination ruling under Indiana Code Section 34-18-11-1, like the ruling in this case, generally is not a final judgment; it is an interlocutory order if, as here, it allows the medical malpractice action to continue. Bueter v. Brinkman, 776 N.E.2d 910, 913 (Ind. Ct. App. 2002); see also Schriber v. Anonymous, 848 N.E.2d 1061, 1065 (Ind. 2006) (holding that trial court's ruling that defendant was a qualified health provider under the Act was not a final, appealable order and noting, "As a result of the ruling, the case will proceed to a medical review panel pursuant to the Act").

Under Indiana Appellate Rule 14, there are three ways we may obtain jurisdiction over an interlocutory appeal: (1) when the right is provided by statute, see App. R. 14(C); (2) when the trial court certifies the order and we accept jurisdiction, see App. R. 14(B); or (3) when the order is one of the nine enumerated types that may be appealed "as a matter of right," see App. R. 14(A). Young v. Estate of Sweeney, 808 N.E.2d 1217, 1219-20 (Ind. Ct. App. 2004). There does not appear to be any statutory basis for this interlocutory appeal.

Additionally, this case cannot proceed as a discretionary interlocutory appeal under Appellate Rule 14(B). The first prerequisite for such an appeal is certification by

the trial court of an order for interlocutory appeal. There is no such certification here. The plaintiffs did file a motion in the trial court asking that the May 22, 2006 order be certified for interlocutory appeal, but the trial court never ruled on the motion or set it for hearing.[4] Appellate Rule 14(B)(1)(e) states, "In the event the trial court fails for thirty (30) days to set the motion for hearing or fails to rule on the motion within thirty (30) days after it was filed, if no hearing is set, the motion requesting certification of an interlocutory order shall be deemed denied." Nor did any party request this court to consider an interlocutory appeal, which is the second prerequisite for a discretionary interlocutory appeal under Appellate Rule 14(B)(2). Regardless, we cannot agree to entertain a discretionary interlocutory appeal where the trial court did not certify its order for interlocutory appeal. See Daimler Chrysler Corp. v. Yaeger, 838 N.E.2d 449, 450 (Ind. 2005).

Finally, there is no basis upon which this interlocutory appeal may proceed as of right. The exclusive bases for an interlocutory appeal as of right are from orders:

> (1) For the payment of money;
>
> (2) To compel the execution of any document;
>
> (3) To compel the delivery or assignment of any securities, evidence of debt, documents or things in action;
>
> (4) For the sale or delivery of the possession of real property;

[4] In any event, this appeal was initiated by Dr. Weinberger and his organizations, who never sought any trial court certification.

> (5) Granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction;
>
> (6) Appointing or refusing to appoint a receiver, or revoking or refusing to revoke the appointment of a receiver;
>
> (7) For a writ of habeas corpus not otherwise authorized to be taken directly to the Supreme Court;
>
> (8) Transferring or refusing to transfer a case under Trial Rule 75; and
>
> (9) Issued by an Administrative Agency that by statute is expressly required to be appealed as a mandatory interlocutory appeal.

Generally, matters appealable as of right "involve trial court orders which carry financial and legal consequences akin to those more typically found in final judgments: payment of money, issuance of a debt, delivery of securities, and so on." State v. Hogan, 582 N.E.2d 824, 825 (Ind. 1991). Ordinary orders on discovery do not fall within this category. See id. It is facially apparent that neither restricting future testimony by Dr. Weinberger nor denying the plaintiffs' motion for default judgment falls within any of the nine categories for interlocutory appeals as of right.

Should Dr. Weinberger reappear at some point in the future, and the trial court adheres to the order prohibiting him from testifying, and if he is found liable to some or all of the plaintiffs and judgment against him is entered, then it would be appropriate to raise this issue on appeal. Unless and until all of these contingencies arise, assessing the trial court's order is premature. As for the denial of the plaintiffs' motion for default judgment, such denial is equivalent to denial of a motion for summary judgment, which clearly is an interlocutory order because "no rights have been thereby foreclosed."

Anonymous Doctor A v. Sherrard, 783 N.E.2d 296, 299 (Ind. Ct. App. 2003). In sum, because the trial court's May 22, 2006 order was not final and it simply allows for further proceedings before the medical review panel, and because no party took the necessary steps to perfect an interlocutory appeal from the order, we lack jurisdiction to consider any of the parties' appeals.

Conclusion

This case is not properly before us as an appeal from a final judgment or an interlocutory order. We dismiss for lack of jurisdiction.

Dismissed.

BAILEY, J., and FRIEDLANDER, J., concur.